

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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MATTHEW CORZINE,

Petitioner,

Case No. 3:13-cv-00119-MMD-VPC

ORDER

v.

RENEE BAKER, et al.,

Respondents.

Petitioner has submitted an application to proceed *in forma pauperis* (dkt. no. 5) and a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court denies the application because petitioner already has paid the filing fee. The Court has reviewed the petition pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. Petitioner will need to show cause why the Court should not dismiss this action as untimely.

Congress has limited the time in which a person can petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

1 (D) the date on which the factual predicate of the claim or claims presented could
 2 have been discovered through the exercise of due diligence.

3 28 U.S.C. § 2244(d)(1). If the judgment is not appealed, then it becomes final thirty
 4 days after entry, when the time to appeal to the Nevada Supreme Court has expired.

5 See *Gonzalez v. Thaler*, 132 S. Ct. 641, 653-54 (2012). See also Nev. R. App. P. 4(b).

6 Any time spent pursuing a properly filed application for state post-conviction review or
 7 other collateral review does not count toward this one-year limitation period. 28 U.S.C.
 8 § 2244(d)(2). The period of limitation resumes when the post-conviction judgment

9 becomes final upon issuance of the remittitur. *Jefferson v. Budge*, 419 F.3d 1013, 1015
 10 n.2 (9th Cir. 2005). An untimely state post-conviction petition is not “properly filed” and
 11 does not toll the period of limitation. *Pace v. DiGuglielmo*, 544 U.S. 408, 417 (2005).

12 Section 2244(d) is subject to equitable tolling. *Holland v. Florida*, 130 S. Ct. 2549, 2560
 13 (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he has
 14 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
 15 in his way’ and prevented timely filing.” *Id.* at 2562 (quoting *Pace*, 544 U.S. at 418).

16 The court can raise the issue of timeliness on its own motion. *Day v. McDonough*, 547
 17 U.S. 198, 209 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

18 In state district court, petitioner pleaded guilty to one count of attempted sexual
 19 assault. That court entered an amended judgment of conviction on August 2, 2007.¹

20 Petitioner did not appeal the judgment. Taking a weekend and the Labor Day holiday
 21 into account, the judgment became final on September 4, 2007. The Court takes
 22 judicial notice of the Nevada Supreme Court’s docket in *Corzine v. State*, No. 57408.²

23 On July 27, 2010, petitioner filed a habeas corpus petition in the state district court.
 24 That court denied the petition, and petitioner appealed. The Nevada Supreme Court

25 ¹In the appeal from the denial of a state habeas corpus petition, discussed below,
 26 the Nevada Supreme Court noted that the original judgment was entered on February 5,
 27 2007. The Nevada Supreme Court used the date of the original judgment in its
 28 calculations. This Court will use the amended judgment in its calculations because it
 does not know why the state district court entered an amended judgment.

²<http://caseinfo.nvsupremecourt.us/public/caseView.do?csID=25553> (last visited
 May 9, 2013).

1 affirmed on May 9, 2011, holding that the petition was untimely pursuant to Nev. Rev.
 2 Stat. § 34.726. Remittitur issued on June 3, 2011. On December 29, 2011, petitioner
 3 filed in the state district court a motion to withdraw his plea. The state district court
 4 denied the motion, and petitioner appealed. The Court takes judicial notice of the
 5 Nevada Supreme Court's docket in *Corzine v. State*, No. 60106.³ The Nevada
 6 Supreme Court affirmed on October 8, 2012, holding that laches barred consideration of
 7 petitioner's motion. The Nevada Supreme Court denied rehearing on December 12,
 8 2012. The Nevada Supreme Court denied *en banc* reconsideration on January 25,
 9 2013. Remittitur issued on February 19, 2013. Petitioner does not give the exact date
 10 when he mailed his federal habeas corpus petition to this Court, but the Court received
 11 it on March 11, 2013.

12 On its face, this action is untimely. Assuming that the amended judgment of
 13 conviction is the controlling judgment, it became final with the expiration of time to
 14 appeal, on September 4, 2007. Petitioner filed nothing in state court in the following
 15 year. The federal period of limitation expired before petitioner filed his state habeas
 16 corpus petition and his plea-withdrawal motion. Even if the petition and the motion were
 17 properly filed for the purposes of 28 U.S.C. § 2244(d)(2), there was no time left for them
 18 to toll.⁴ *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001). This Court did not receive
 19 the federal habeas corpus petition until four and a half years after the federal period of
 20 limitation had expired. Petitioner will need to show cause why the Court should not
 21 dismiss the action as untimely.

22 IT IS THEREFORE ORDERED that the application to proceed *in forma pauperis*
 23 (dkt. no. 5) is DENIED as moot.

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 26 ³<http://caseinfo.nvsupremecourt.us/public/caseView.do?csID=28269> (last visited
 27 May 9, 2013).

28 ⁴The state habeas corpus petition certainly did not qualify for the statutory tolling
 of § 2244(d)(2), because it was untimely. *Pace*, 544 U.S. at 418.

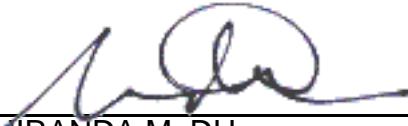
1 IT IS FURTHER ORDERED that the Clerk of the Court shall file the petition for a
2 writ of habeas corpus pursuant to 28 U.S.C. § 2254.

3 IT IS FURTHER ORDERED that petitioner shall have thirty (30) days from the
4 date of entry of this order to show cause why the Court should not dismiss this action as
5 untimely. Failure to comply with the Court's order will result in the dismissal of this
6 action.

7 IT IS FURTHER ORDERED that the Clerk shall add Catherine Cortez Masto,
8 Attorney General for the State of Nevada, as counsel for respondents.

9 IT IS FURTHER ORDERED that the Clerk shall electronically serve upon
10 respondents a copy of the petition and a copy of this order. No response by
11 respondents is necessary.

12 DATED THIS 23rd day of May 2013.

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16 MIRANDA M. DU
17 UNITED STATES DISTRICT JUDGE
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